Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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(2)

No. 86-659

IN THE SUPREME COURT
OF THE UNITED STATES

HUGH A. REYNOLDS, AND THOMAS G. PERRY,

Petitioners,

V.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

SUPPLEMENTAL APPENDIX

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EDITOR'S NOTE

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

R. E. BADER, et al *
*
Appellant, *
*
v. *
*
DEPARTMENT OF TRANS- *
PORTATION, FEDERAL *
AVIATION ADMINISTRATION, *
*
Agency. *

ORDER

By a motion received on December 3, 1982, the attorney for the above-referenced appellants requests that the record be re-opened for the development of evidence concerning several recent settlements of appeals from former Air Traffic Controllers who were removed as the result of the 1981 strike against the agency.

The matter of recent settlements not being relevant to the instant consolidated appeal, the motion is DENIED.

S. F. VESSER
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

IN THE MATTER OF:	*	
	*	
HUGH A. REYNOLDS,	*	
THOMAS C. PERRY,	*	
Appellants,	*	DECISION NUMBER:
	*	ATO75282F0674
v.	*	DECISION NUMBER:
	*	ATO75281F1471
DEPARTMENT OF	*	
TRANSPORTATION,	*	
FEDERAL AVIATION	*	
ADMINISTRATION,	*	
	*	
Agency.	*	

INTRODUCTION

By separate petitions, the appellants submitted timely appeals to the Regional Offices of the Merit Systems Protection Board. The appeals are from administrative actions taken by the Federal Aviation Administration (FAA) which resulted in the removal of each appellant from the position of Air Traffic Control Specialist at an Air Traffic Control Tower.

Because the issues are substantially the same, the appeals have been consolidated. 5 U.S.C. §7701(f)(1); 5 C.F.R. §1201.36(a)(1). Each appellant requested a hearing and a hearing on the consolidated appeals, which included the appeals of other former air traffic controllers, was held on October 18, 19, 20 and 21, 1982 at Memphis, Tennessee. [1]

JURISDICTION

At the time of the removal action, each appellant was an employee as defined by 5 U.S.C. §7511(a)(1)(A) and a removal is an action covered by 5 U.S.C. §7512. Accordingly, the appeals were accepted for adjudication on the basis that they are within the appellate jurisdiction of the Merit Systems Protection Board. 5 U.S.C. §7513(d) and 5 U.S.C. §7701.

FINDINGS OR FACT AND CONCLUSIONS

The burden of proving the charges on which an adverse action is based rests with the agency taking such action and the agency decision must be supported by a preponderance of the evidence. 5 U.S.C. §7701(c)(1)(B); 5 C.F.R. §1201.56(a)(ii). This standard must be applied to every element of proof of the agency's case. See In re: William F. Van Sciver, 1 MSPB 94 (1979). The agency must establish that the action was taken for such cause as will promote the efficiency of the service and that the disciplinary sanctins imposed are for reasons relevant to this standard. Douglas v. Veterans Administration, MSPB Dkt. No. ATO75299006 (April 10, 1981). The appellants have the burden

of proof with respect to any affirmative defenses described in 5 U.S.C. § 7701(c)(2). See 5 C.F.R. §1201.56(b).

Each appellant was advised in a written notice of his proposed removal, based on the following reasons:

> Reason 1: Violation of 5 U.S.C. §7311 which states in pertinent part, "an individual may not accept or hold a position in the Government of the United States if he . . . particicpates in a strike against the Government of the United States . . . " and 18 U.S.C. §1918 which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.
>
> Reason 2: Unauthorized absence.

In a specification set out under Reason 1, the agency noted tht

beginning at approximately 7:00 a.m. EDT, on August 3, 1981, a nationwide strike by air traffic controllers occurred; noted the time and date each first failed to report for duty; and concluded that because each appellant had failed to report for his scheduled tour of duty or or after August 3, 1981, to the date of the notice, that employee participated in a strike against the United States.

In a specification set out under Reason 2, each ppellant was advised of the time and date his unauthorized absence commenced based on his failure to report for his scheduled tour of duty. The specification noted that each had been sent a notice that an illegal strike was in progress, and that he must return for duty; but that each failed to return to duty.2 The

Board has taken official notice (subject to refutation) of the fact that a strike called by the now decertified Professional Air Traffic Controllers Organization (PATCO) commenced on August 3, 1981, and continued through August 6, 1981, and that the strike was illegal. Ketchem v. Department of Transportation, MSPB Dkt. No. DA075281F0713 (May 28, 1982).

In support of the charges concerning each appellant, the agency furnished copies of agency personnel logs, (facility sign-in sheets), assignment schedules and time and attendance reports reflecting, in pertinent part, for the period of August 3, 1981 through August 6, 1981, that each appellant was scheduled for a shift assignment or assignments during that period of time, but that each failed to report for his shift assignment.

The appellants have not refuted the fact of the strike as officially noticed by the Board in Ketchem, supra,. In light of the appellants' undisputed absences from scheduled shft assignments during the period of August 3, 1981 through August 6, 1981, I find that such absences constitute prima facie evidence of the appellants' voluntary participation in the strike. Thus, the burden of persuasion now shifts to the appellants to rebut the agency's case by presenting evidence showing a lack of knowledge as to the existence of the strike or that their absence was due to some reason other than intentional participation in the strike. Schapansky v. Department of Transportation, MSPB Dkt. No. DA075281F1130 (October 28, 1982).

The evidence as reflected in the testimony of the Chief of each facility, reveals that as a result of an August 3, 1981 announcement by President Reagan, striking employees were allowed to return to work if they reported for their first scheduled shift on or after 11:00 a.m. E.D.T. on August 5, 1981. the unrebutted evidence also shows that each appellant had been briefed, prior to the strike, that participation in a strike against the Government was illegal.

With respect to appellant Hugh A. Reynolds, the undisputed evidence reflects that August 3, 1981 was a regular day off (RDO) and that he had scheduled shift assignments on August

4 through 8, 1981. The appellant's deadline for reporting for work, based on the Presidential "amnesty", was August 5, 1981, at 2:00 p.m. Facility Chief William E. Branch testified that he observed the appellant picketing on August 4, 1981 (T.325). The appellant furnished no explanation for his August 4, and 5, 1981 absence to the agency or in his appeal to the Board. Thus, appellant Reynolds has not rebutted the agency's case.

With respect to appellant Thomas G. Perry, the undisputed evidence shows that August 3, 1981 was a regular day off and that he had scheduled shift assignments on August 4 through 8, 1981. Perry's deadline for reporting to work, based on the Presidential "amnesty", was 2:00 p.m. on August 5, 1981. Gerald W. Graham, Facility Chief at the time of the strike,

testified that his attempts to contact Perry on August 1 and 1, 1981, to ascertain Perry's future availability for work because of the anticipated strike, were unsuccessful; 3 tht Perry returned a call on August 3, 1981; that he told Perry that a strike had taken place and that Perry was needed at work; that because he was out of town, Perry advised that he was unavailable for work on August 3, 1981; and that he then asked Perry to be at work on August 4, 1981; and that he then asked Perry to be at work on August 4, 1981, at 7:00 a.m. Graham also testified that Perry again telephoned him at approximately 9:30 p.m. on August 3, 1981, inquiring about his status; that he advised Perry that he was considered AWOL on August 3, 1981 because he was not at work when needed; and that Perry then

responded that he was "casting his lot with the union" because he felt the AWOL would result in a felony charge against him (T.413-414).

Graham added that they talked again on the evening of August 4, 1981; that they discussed the Presidential deadline; that he asked that the appellant not commit himself, notwithstanding the fact that he listed the safety precautions available for the appellant (T.414.415).

In his oral and written responses to the agency and in his initial appeal to the Board, the appellant furnished no explanation for his failure to report for scheduled shifts on August 4 and 5, 1981.

Although Graham did not dispel the appellant's concern about possible felony charges which was expressed during their second telephone conversation on August 3, 1981, I find that such does not justify the appellant's subsequent absences. This would be particularly true with respect to the appellant's August 5, 1981 absence because the undisputed evidence shows that during the evening of August 4, 1981, after the appellant had missed a shift assignment, Graham again talked with the appellant and notified him that he was needed at work for his August 5, 1981 shift assignment. Thus, the appellant was given clear notice that he could return to work on August 5, 1981, and was in fact, solicited to return on that date. Because the appellant did

not or could not report, I find that he has not rebutted the agency's prima facie case.

The appellants argue that they considered themselves terminated as of 11:00 a.m. on August 5, 1981, based on the President's August 3, 1981 message. The appellants also claim that the agency was remiss in failing to notify them of an extended deadline to return to work as a result of the Presidential "amnesty" or that there was confusion concerning deadlines.

Any resporting deadline confusion by the appellants could have been avoided or resolved by reporting to or contacting the facility by 11:00 a.m., E.D.T. on August 5, 1981, if the appellants in fact perceived that to be their reporting deadline; however, neither of the appellants elected to

pursue such a course of action. While the agency may not have communicated to each appellant his specific deadline which was based on its liberal construction and application of President Reagan's 48-hour "amnesty", the agency was under no obligation to convey that information. Each appellant's absence was a matter of his individual choice. It was not the agency's responsibility to seek out and attempt to persuade each appellant to report for work. Thus, I find that if the appellanbs now contend that they failed to report for duty because of a confusion about a deadline, if there was in fact confusion, they did so as the result of their own irresponsibility and not the result of any agency nonfeasance.

Based on the appellants' established unauthorized absences and the prima facie case of strike participation which the appellants have not successfully rebutted, I find that the preponderance of the evidence supports the charges. Because the evidence discloses that one an employee missed his reporting deadline, the employee was not, or would not be permitted to return to duty, absent an acceptable excuse for being absent, I conclude that the chargeable unauthorized absence and strike participation extended only through the deadline for each employee.

The appellants contend that the agency committed certain procedural errors. An agency's decision may not be sustained if it is shown that harmful error in the application of the

agency's procedures at arriving at such a decision occurred. 5 U.S.C. § 7701(c)(2)(A). The burden is upon an appellant to establish, as an affirmative defense, that there was error and that it was harmful. Parker v. Defense Logistics Agency1 MSPB 489, 492 (1980). Harmful error is defined in the Board;s regulations at 5 C.F.R. § 1201.56(c)(3) as "error which might have caused the agency to reach a conclusion different than the one reached." In deciding whether such error rises to that standard, the Board found that it is helpful to consider:

> whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before the agency. However, stated, the decisice factors are the closeness of the agency's decision, the centrality of the issue affected by the error, and

> any steps taken to mitigate the effect of the error." Id. at 493.

The appellants first claim that they were improperly denied 30 days' advance notice of the proposed removal actions. The law provides that an employee against an action is proposed it entitled to at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which as sentence of imprisonment may be imposed. 5 U.S.C. § 7513(b)(1). Because 18 U.S.C. § 1918 provides that

participation in a strike against the United States Government is a felony, punishable by up to one year of imprisonment, and becuase the appellants were absent without authorization or notice from work

during the strike, the agency had reasonable cause to believe the appellants had committed a crime for which a sentence of imprisonment might be imposed. Thus, the agency's invocation of 5 U.S.C. § 7513(b)(1) was justified and I find no error with respect to this matter. Schapansky, supra, at 8.

The appellants furnished no evidence in support of their claim that statutes prohibiting strikes by federal employees are unconstitutional and the Board has concluded otherwise. Ketchem, supra, at 5, with pertinent case law citations at footnote 12.

The appellants also contend that they were improperly denied a minimum of seven days in which to orally respond to the charges. An employee against

whom an adverse action is proposed is entitled to a reasonable time, but not less than seven days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer. 5 U.S.C. § 7513(b)(2).

The evidence reflects that at his request, appellant Perry made his oral response on August 4, 1981, the day after he received his certified mail copy of the notice of proposal removal. Thus, Perry's claim of error regarding the time in which to respond is without merit.

A review of the record reveals that in appellant Reynolds' case, the oral response was heard by the agency official on the seventh day after

receipt of the notice of proposed removal. In Parker, supra, at 492, the Board, in keeping with Congressional intent as to when procedural error is to be considered to be reversible error, found that the statute clearly places upon the appellant the burden of establishing as an affirmative defense that the agency committed procedural error and that the error was harmful.

In Ratley v. Department of the Army, MSPB Dkt. No. ATO7528110338 at 5, (September 17, 1982), the Board held as follows:

> Because 5 U.S.C. § 7513(b)(2) provides that an employee must have at least 7 days to respond to an agency charge, any shorter period of time is inherently unreasonable and violates the requirements mandated by statute and is thus not in accordance with law. (footnote omitted).

Ratley can be read as holding that less than seven days to reply to an advance notice is per se harmful procedural error because seven days is mandated by law. Upon examination of the law and Board Orders, however, Ratley, stands as inconsistent. Nowhere in the law are procedural errors reversible errors because they are "not in accordance with the law."

It is the agency's decision to take disciplinary action that cannot be sustained by the Board if it is not in accordance with law. 5 U.S.C. § 7701(c)(2)(C). Within that same section of the statute, Congress provides that agency decisions cannot be sustained if the appellant shows harmful errors in procedures used to effect the action. 5 U.S.C. §

7701(c)(2)(A). If errors in procedures mandated by statute are considered harmful per se, absurd results could ensue. For example, when an agency does not give an employee specific reasons for an imposed disciplinary action, but the record shows that the appellant was aware of the reasons for the discipline, or if an agency gives an employee only 29 days rather than the statutorily mandated 30 days' advance notice. Cf. Cade V. U. S. Postal Service, MSPB Dkt. No. SFO7528010370 (November 30, 1981) (the Board found that a failure to afford the appellant the full period of time required is not reversible error absent a showing of harmful error by the appellant); Gallego v. Department of the Navy, MSPB Dkt. NO. SFO7528110759 (July 21, 1982) (shortening the notice period by

seven days was error but that it did not warrant reversal of the removal action under 5 U.S.C. § 7701(c)(2)(A0.

While the appellants plead harmful error with respect to the fact they received less than seven full days to make an oral reply, they have not shown harm. Accordingly, I find that any shortened oral response period had no effect on the agency decision and, therefore, conclude that such does not constitute harmful error.

The next claim of harmful error made by the appellants is that hey were unlawfully suspended during the pendency of the removal actions. The agency acknowledged that the appellants were placed on a non-duty and non-pay status during the notice period.

A "suspension" is defined as the placing of an employee in a temporary status without duties and pay for disciplinary reasons. 5 U.S.C. §§ 7501(2) and 7511(2). It is apparent tha the agency considered it contrary to its best interest to return the appellants to a duty statut during the notice period. However, the agency has offered no explanation for failing to retain the appellants in a pay status. A suspension of more than 14 days must be taken in accordance with te procedures set out in 5 U.S.C. § 7513 which includes, inter alia, an advance written notice and a right to reply to the proposed action. It is clear from the record that the agency did not furnish the appellants with a notice of proposed suspension nor furnish the appellants with an

opportunity to reply thereto. Accordingly, I find that the agency's de facto supension actions were effected, without regard for the requirements of 5 U.S.C. § 7513 and, therefore, cannot be sustained. 4 See Cuellar v. U. S. Postal Service, MSPB Dkt. No. SF075299045 (November 13, 1981).

The appellants also contest the fact that they were denied requests for extensions of time in which to provide

their responses to the proposed removal actions, but provided only speculation of harmful error in that regard. Thus, the appellants have failed to carry the burden of proof with respect to the claim of harmful error in connection with that matter. Nevertheless, on my review of the

record, the claims made by the appellants, and the circumstances wherein the majority or a substantial number of each facility's workforce was absent from scheduled shifts, I find that the appellants were afforded a reasonable time to review the material relied on to support the proposed removals and to respond to the proposed actions. Accordingly, I find no error with respect to the agency's decision to deny these requests for time extensions.

The appellants also claim harmful error based on the fact that their requests for certain documentary material, during and after their oral presentations, was not then provided. However, the appellants have not shown how tht material, some of which had been previously furnished or made

available and some of which was subsequently obtained through discovery proceedings, would have had any effect on the agency decision. Accordingly, I find no error with respect to this matter. Even if it was error, it is not shown to be harmful.

The appellants next claim that the agency evidence concerning the charges, should have been limited, at the hearing, to that material and evidence provided prior to the hearing.

A proceeding before the Board is a de novo proceeding, and the Board may consider all the relevant evidence presented by both parties. Nothing in the law or in the Board's regulations restricts an agency to reliance upon

its documentary administrative record. Ziess v. Veterans Administratin, MSPB Dkt. No. NYO75209017 (September 1, 1981). See also Chavez v. Office of Personnel Management, MSPB Dkt. No. DA831L09003 at 13-14 (May 28, 1981). Thus, contrary to the appellants' claim, the agency evidence of picketing activity, PATCO membership, and strike support activities constituted admissible evidence relating to strike aprticipation.

The appellants also con'end that the removal actins were pre-determined as the result of statements by public officials, including President Reagan, that strikers would be fired. However, the evidence shows that each appellant was afforded the opportunity to respond to the charges against him,

but that neither furnished any explanation for his absences. The evidence, as reflected by the testimony of each facility chief reveals that individual consideration was given to each appellant's case and that each facility chief had the authority to decide eash case based on individual circumstances. Thus, the appellants' assertion that the actions were pre-determined is not supported by the evidence presented.

The appellants contend that the agency actions against them constituted a prohibited personnel practice,

specifically claiming that they were treated unequally when certain employees were allowed to return to work, because of varying deadlines. However, the appellants have not pointed out any instance where

similarly situated employees at their respective facilities were treated differently; i.e., there is no evidence showing that any employees not taking advantage of the Presidential "amnesty" were allowed to return to work. Thus, the appellants have failed to show unequal or disparate treatment.

Contrary to the appellants' claim, the evidence presented does not reveal the removal actions were a violation of the Merit Systems principles set out in 5 U.S.C. § 2301. Any failure of the agency to consider appellants' work performance, ability, aptitude, and general qualifications, is of no consequence since those matters are irrelevant to the charges on which the removal actions were based. The appellants also claim that the removal

actions were taken against them as repsial for their disclosure of violations of laws, rules, and regulations; misnamagement; gross waste of funds; abuse of authority; and substantial dnager to public safety. However, the evidence, as revealed in the testimony of agency officials, discloses the sole reasons for the removal actions were as set out in the letters of proposed removal, specifically, AWOL and strike participation. Accoringly, I find no merit in the appellants' claim of reprisal.

The appellants also claim that the agency prohibition against their reemployment with the agency and their inability to compete with others for employment, because of the stigma of

their removal, constitutes a prohibited personnel practice; however, those matters are not subject to my review in this decision. Contrary to the appellants' assertion, I find that any subsequent settlement of appeals concerning other former air traffic controllers removed for striking and AWOL is irrelevant to the issues in the instant appeals.

Nexus may be presumed where there is a "clear and direct relationship" between such misconduct and both the "employees ability to accomplish his . . . duties satisfactorily" and "the agency's ability to fulfill its mission." Doe v. Hampton, 566 F.2d 265, 272, n. 20 (D.C. Cir. 1977); see also, Bonet v. U. S. Postal Service, 661 F.2d 1071, 1078 (5th Cir. 1981).

Because of the intentional disruptive effect of the strike on the agency mission, caused by the apellants' absences in support of a strike, I find no basis for mitigating the penalty for removal, notwithstanding the appellant's prior favorable employment record.

Removal of an air traffic controller for proven participation in a strike against the Federal government is an appropriate penalty and promotes the efficiency of the service. Johnson v. Department of Transportation, MSPB Dkt. No. DC075281F0998 at 16 (November 10, 1982); Schapansky, supra, at 10-11. Since removal is found to be appropriate in these cases, it is unnecessary for me to determine the correctness of the agency's assertion that removal of a striking employee is

mandated by statute.

DECISION

The removal actions are AFFIRMED. The agency is ORDERED to amend the records to show each appellant in a pay status from the date of the notice of proposed removal through the effective date of the removal action.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on March 1, 1983, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems

Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419 no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed;

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. § 7703(b)(1), 5 the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the U. S. Court of Appeals for the Federal Circuit, 717 Madison Place, N. W., Washington, D.C. 20005, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

S. F. Vesser
Presiding Official